Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-994

In the Supreme Court
of the United States

OCTOBER TERM, 1983

CARL J. MOLLNOW,
Petitioner,

v.

PAUL K. CARLTON, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

JOHN W. SHONKWILER
MORGAN & SHONKWILER, P.C.
205 Housing Center
15555 S. W. Bangy Road
Lake Oswego, Oregon 97034
Telephone: (503) 684-0946
Counsel for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 2-84

TABLE OF CONTENTS

Page

1. A *Bivens*-type claim may arise against military servicemen where they completely deprive Petitioner of any other form of redress or review. 2

2. Petitioner did exhaust and was precluded by Respondents from reinitiating a review by the Board for Correction of Air Force Records 4

3. Petitioner challenges the dismissal of each cause of action in his Complaint 5

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES

Allee v. Medrano, 416 U.S. 802, 94 S. Ct. 2191, 40 L. Ed.2d 566 (1974) 6

Armstrong v. United States, 169 Ct. Cl. 486 (1965) 4

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 338, 91 S. Ct. 1999, 29 L. Ed.2d 619 (1971) 1, 2, 5, 6

Bolger v. Marshall, 193 F.2d 37 (1951) 4

Chappell v. Wallace, 103 S. Ct. 2362, 76 L. Ed.2d 586 (1983) 2

Courtney v. Secretary of Air Force, 267 F. Supp. 305 (D.C. Cal. 1967) 4

Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) 2

Flute v. United States, 535 F.2d 624 (1974) 4

Friedman v. United States, 310 F.2d 381, *cert. den.*, 373 U.S. 932, 83 S. Ct. 1540, 10 L. Ed.2d 691 (1962) 5

Griffen v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed.2d 338 (1971) 6

June v. Secretary of Navy, 557 F. Supp. 144 (D.C. Pa. 1982) 5

Ogden v. Zuckert, 298 F.2d 312 (1961) 5

Reed v. Franke, 187 F. Supp. 905, *aff'd*, 297 F.2d 17 (4th Cir. 1960) 4

Rolles v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1975) 5

TABLE OF AUTHORITIES (Cont.)

Page

CASES

Sherengos v. Seamans, 449 F.2d 333 (4th Cir. 1971) 4

Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984) 3

VonHoftburg v. Alexander, 615 F.2d 633 (5th Cir. 1980) 5

Withum v. O'Conner, 506 F. Supp. 1374 (D.C. Puerto Rico, 1981) 5

STATUTES AND REGULATIONS

10 U.S.C. §1552 ..... 4, 5

42 U.S.C. §1985(1) 2, 5

42 U.S.C. §1985(3) 2, 5, 6

42 U.S.C. §1986 5

MISCELLANEOUS

41 Op. Atty. Gen., October 11, 1948 5

No. 83-994

In the Supreme Court of the United States

OCTOBER TERM, 1983

CARL J. MOLLNOW,
Petitioner,

v.

PAUL K. CARLTON, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

Respondents oppose the Petition for a Writ of Certiorari upon the grounds that presumably Petitioner's statutory and *Bivens*-type claims cannot be applied against fellow servicemen, even if the intramilitary remedy is completely unavailable and inadequate. In addition, Respondents assert that Petitioner has not

exhausted all the alternative remedies available, nor has he challenged dismissals of his causes of action under 42 U.S.C. §1985(1) and (3), and one *Bivens*-type claim. All of Respondents' assertions are in error.

1. A BIVENS-type claim may arise against military servicemen where they completely deprive Petitioner of any other form of redress or review.

Reliance upon *Chappell* v. *Wallace*, 103 S. Ct. 2362 (1983) for the premise that a *Feres* immunity applies to all military servicemen, regardless of the availability of an adequate military remedy, is misplaced. The *Chappell* decision is inextricably tied to the reasoning for a serviceman's immunity enunciated in *Feres* v. *United States*, 340 U.S. 135 (1950). The *Feres* Court created this form of immunity only because Congress had already established an internal military remedy program. The Court deemed the composite of these remedies as an adequate alternative to other forms of damages claims. However, the immunity is not statutory but judicially created. The reasoning for its existence clearly includes the requirement that there be adequate compensable remedies available within the military system. *Feres* v. *United States*, *supra* at 144-146.

Respondents suggest that the mere existence "on paper" of the various military remedies should be sufficient to prevent Civil Right Act and *Bivens*-type claims. Congress, however, does not create statutory

remedies with the intention that they will not be made available. Where, as here, the entire array of military related remedies are intentionally blocked by Respondents, Congress's "activity in the field" has been utterly destroyed. There are no longer any "special factors" counseling caution for a judicial review.

Indeed, there is no indication that Congress even considered precluding the use of judicial review where the reviewing military officers conspired to prevent the availability or exercise of the statutory remedies. This Court has recently recognized that such "* * * silence takes on added significance in light of Congress's failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 623 (1984).

Finally, Respondents misconstrue the doctrine of exhaustion of administrative remedies. Petitioner's duty is to apply for those remedies. If his applications are refused, he has done all that is required. It is not within Petitioner's power to grant himself a review. Here, Petitioner went further and repeatedly applied for such reviews with the result of consistent denials. Petitioner may be unique, but his case does fall within the extreme example where he either exhausted or was prevented by Respondents from exhausting virtually all of the alternative remedies envisioned by Congress.

2. Petitioner did exhaust and was precluded by Respondents from reinitiating a review by the Board for Correction of Air Force Records.

Contrary to Respondents' assertion, Petitioner, in fact, duly made application for review of his grievances under 10 U.S.C. §1552. His application for review by the Board for Correction of Air Force Records was refused. After his court martial proceeding, Petitioner's military attorneys again attempted to exercise this remedy and were prevented from doing so by the Respondents. Petitioner's Complaint includes specific allegations identifying this interference by Respondents and Petitioner's exhaustion of all other forms of statutory and regulatory remedies.

Presumably, the absence of a discussion of a 10 U.S.C. §1552 remedy in the Court of Appeals' opinion was due to a recognition that such remedy is not meant to be either mandatory or exclusive. See, *Bolger* v. *Marshall*, 193 F.2d 37 (1951); *Reed* v. *Franke*, 187 F. Supp. 905, *aff'd*, 297 F.2d 17 (4th Cir. 1960); *Sherengos* v. *Seamans*, 449 F.2d 333 (4th Cir. 1971). Boards for the Correction of Military Records are not required to grant hearings to all applicants. There is no statutory right to a hearing under this provision. *Flute* v. *United States*, 535 F.2d 624 (1976); *Armstrong* v. *United States*, 205 Ct. Cl. 754 (1974); *Courtney* v. *Secretary of Air Force*, 267 F. Supp. 305 (D.C. Cal. 1967). In fact, the remedy would not be adequate as such boards may not award money dam-

ages for constitutional torts. Nor may they provide for reinstatement of servicemen after they were reassigned from active to nonactive duty status. See, *VonHoftburg* v. *Alexander*, 615 F.2d 633 (5th Cir. 1980); *Rolles* v. *Civil Service Commission*, 512 F.2d 1319 (D.C. Cir. 1975); 41 Op. Atty. Gen., October 11, 1948.

The failure of military personnel to seek relief from an Air Force Board for Correction of Military Records does not even deprive federal courts of jurisdiction over a serviceman's action. *Rolles* v. *Civil Service Commission, supra; Ogden* v. *Zuckert*, 298 F.2d 312 (1961); *Withum* v. *O'Conner*, 506 F. Supp. 1374 (D.C. Puerto Rico, 1981). Exhaustion of the 10 U.S.C. §1552 remedy is not required. See also, *June* v. *Secretary of Navy*, 557 F. Supp. 144 (D.C. Pa. 1982); *Friedman* v. *United States*, 310 F.2d 381, cert. den., 373 U.S. 932, 83 S. Ct. 1540, 10 L. Ed.2d 691 (1962).

3. Petitioner challenges the dismissal of each cause of action in his Complaint.

The first and principal cause of action involves a violation under 42 U.S.C. §1985(1) as the Respondents conspired to molest, interrupt, hinder and impede Petitioner from carrying out the lawful discharge of his duties of office. Alternatively, the Complaint also alleges a 42 U.S.C. §1985(3) claim and two direct constitutional or *Bivens*-type claims. Finally, a corresponding claim is made under 42 U.S.C. §1986.

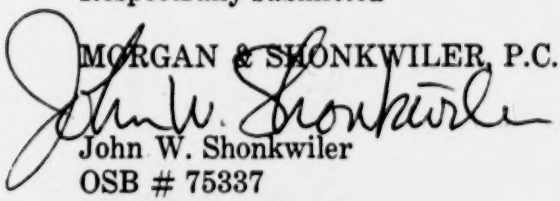
Petitioner's second *Bivens*-type claim has been misconstrued by the Respondents, and thereby the Court of Appeals, as a claim for common law torts. The two *Bivens*-type claims are based upon constitutional torts, not common law torts. The essential difference in the pleadings of these two alternative actions is that one alleges violations of constitutionally protected rights as being done within the scope of military employment. The other action alleges the acts were committed outside the scope of that employment.

Petitioner's 42 U.S.C. §1985(3) claim is supported by specific allegations in the Complaint establishing that Petitioner falls within a class to be protected under the statute and that the acts of the Respondents were done with discriminatory animus against that class. *Griffen* v. *Breckenridge*, 403 U.S. 88 (1971); *Allee* v. *Medrano*, 416 U.S. 802 (1974). Finally, Respondents attempt to rewrite Petitioner's Complaint to dispute the extensive period of time Petitioner was taken off active duty, stripped of regular duty status, and barred from entry on any military installation of the United States. The allegations in the Complaint are clear and provable. Respondents chose to place Petitioner in a status of *Persona non grata* to prevent any initiating of a military review outside the conspiratorial cadre. Thus, the Petitioner was completely isolated from the established military review and record structure.

CONCLUSION

For these reasons a writ should issue and the dismissal of each of the Petitioner's causes of action should ultimately be reversed.

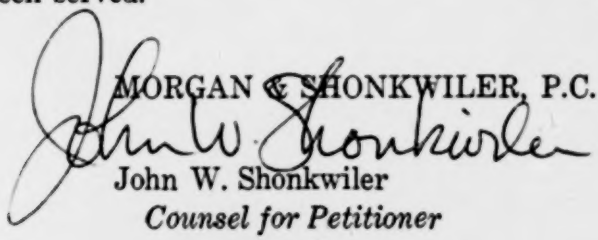
Respectfully submitted



MORGAN & SHONKWILER, P.C.
John W. Shonkwiler
OSB # 75337
205 Housing Center
15555 S. W. Bangy Road
Lake Oswego, Oregon 97034
Telephone: (503) 684-0946
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 1984, three copies of the Reply Brief for Petition for Writ of Certiorari were mailed, postage prepaid, to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530; and to Gene S. Anderson/ Robert M. Taylor, United States Attorney Office, 3600 Seafirst Fifth Avenue Plaza, 800 Fifth Avenue, Seattle, Washington 98104, Counsel for Respondents. I further certify that all parties required to be served have been served.



MORGAN & SHONKWILER, P.C.
John W. Shonkwiler
Counsel for Petitioner

205 Housing Center
15555 S. W. Bangy Road
Lake Oswego, Oregon 97034
Telephone: (503) 684-0946